United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1343

74-4577

United States Court of Appeals

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

CLARENCE O. GOKAY, JR., an infant by his mother DOROTHY GOKAY, individually,

Plaintiff-Appellee,

—against—

MARC ANTHONY'S INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT

POINT I

Since the Workmen's Compensation Law of Pennsylvania clearly supercedes and supplants the provisions of the Pennsylvania Child Labor Law relating to minors employed or permitted to work illegally, plaintiff's exclusive remedy is under Workmen's Compensation.

In addition to the authorities cited in Points I and II of our main brief which conclusively demonstrate that plaintiff's exclusive remedy is in Workmen's Compensa-

tion*, there is an extremely relevant decision by the United States Court of Appeals for the Third Circuit which summarizes and interprets the law of Pennsylvania in this area and is dispositive of the issues in the case at bar.

In *Schick* v. *Good Humor Corp.*, 438 F.2d 336 (3d Cir. 1971) the Court stated at pages 337-338:

> "However unsettled Pennsylvania case law may once have been, the Pennsylvania Supreme Court's decision in Evans v. Allentown Portland Cement Co., 433 Pa. 595, 252 A.2d 646 (1969), now leaves no doubt about the disposition required in this diversity action. *Evans* explicitly declared that the cases upon which plaintiff here relies, Lincoln v. National Tube Co., 268 Pa. 504, 112 A. 73 (1920) and King v. Darlington B. & M. Co., 284 Pa. 277, 131 A. 241 (1925), 'were laid to rest by [1931, 1939, and 1945] amendments to the Workmen's Compensation Act and our cases of Fritsch v. Pennsylvania Golf Club, 355 Pa. 384, 50 A.2d 207 (1947), and Lengyel v. Bohrer, 372 Pa. 531, 94 A.2d 753 (1953).' 252 A.2d at 647. Although plaintiff contends that a minor may not be bound by the provisions of the Workmen's Compensation Act if his injuries occurred during a violation by the employer of a statutory or regulatory obligation, *Evans* specifically rejected this argument:

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* This is so since the highest court of Pennsylvania has repeatedly held that infants who are either "permitted to work" or are "employed" are considered employees under §672 of the Pennsylvania Workmen's Compensation Law which by its very language supercedes and supplants the provisions of the Child Labor Law relating to illegally employed minors.

> The amendment of 1945 provided that if minors, like adults, did not elect not to be bound by these workmen's compensation provisions, they would be so bound and waived all other rights of action. Fritsch v. Pennsylvania Golf Club, supra, and Lengyel v. Bohrer, supra, quite properly interpreted the effect of these amendments as prohibiting an action at law by an illegally employed minor, in the absence of a rejection of the Workmen's Compensation Act by either the minor or the employer. The obvious intent of the amendments was to give the minor a *quid pro quo* in the form of additional compensation but prohibit any common law action.
>
> The minor is thus treated just like the adult, with the exception of the additional amount recoverable. With regard to adults, we have often held, most recently in Hyzy v. Pittsburgh Coal Co., 384 Pa. 316, 121 A.2d 85 (1956), that even where neglect of a statutory duty is alleged, the employee's only remedy is under the Workmen's Compensation Act.

Id. at 647-648.

"Plaintiff has not rejected Workmen's Compensation coverage. Indeed, he pursued the remedies provided for under the Act and presently is engaged in state litigation over the amount of weekly compensation due the estate.

"The judgment of the district court will be reversed and the cause remanded with directions to enter judgment notwithstanding the verdict for defendant-appellant."

POINT II

Over defendant's objection the court below incorrectly charged the law of Pennsylvania as it defines "employee" in cases involving minors who are employed or permitted to work illegally.

The trial court erroneously rejected defendant's requests to charge the jury with what was clearly the correct interpretation of the term "employee" under Pennsylvania law

Section 672 of Pennsylvania's Workmen's Compensation Law clearly stated that the term employe (sic) includes any minor who is either employed *or* permitted to work in violation of *any* provision of the laws of Pennsylvania. The court below charged however that only if the jury found plaintiff to be an "employee" would recovery be barred by the Workmen's Compensation Law. The court then improperly charged the jury that if plaintiff was "permitted to work" by defendant the child labor law applied and in that event there was absolute liability on the part of the defendant.

Defendant repeatedly requested the court to charge the law of Pennsylvania as it relates to infants who are "employed" or "permitted to work" illegally (240a-243a, 255a). These requests were denied (241a, 255a) although they correctly stated the law of Pennsylvania (See, appellant's main brief Points II and III; *Schick* v. *Good Humor Corp.*, 438 F.2d 336 [3d Cir. 1971]).

In deciding to charge the Child Labor Law (255a) the court below erroneously assumed that the Child Labor Law has independent vitality separate and apart from

the Workmen's Compensation Law. This is simply not so. Every decision on the issue is to the contrary (See, appellant's main brief Points II and III as well as *Schick* v. *Good Humor Corp.*, 438 F.2d 336 [3d Cir. 1971]).

The jury by its verdict found that plaintiff was "working" for defendant when he was injured but that he was not an "employee". This is precisely the situation provided for in § 672 and Workmen's Compensation is then the exclusive remedy. The verdicts as such, are therefore inconsistent.

The testimony of defendant that he did not consider the infant plaintiff an employee is in no way determinative of the issues in this case

Plaintiff would have this Court determine that he was not an employee under § 672 of the Pennsylvania Workmen's Compensation Law simply because defendant testified that he did not consider him an employee. This is surprising when one considers that it was plaintiff's counsel himself who abandoned all negligence claims in an attempt to prove the infant was working for defendant with his consent and it was plaintiff's counsel who made every effort during trial and in summation to have the jury find that the infant was "working in or about the restaurant" (See appellant's main brief at pages 10-12).

In any event, the law of Pennsylvania is to the contrary. The courts of that state "have held that the fact that an *employer* did not consider a claimant an employee or deduct income taxes or social security contributions from wages is not determinative of a claimant's status" (*Workmen's Compensation Appeal Board* v. *Piccolino*, 341 A.2d 922 [Comm. Ct. Pa. 1975]).

CONCLUSION

For all of the reasons set forth herein and in appellant's main brief the judgment appealed from should be reversed and the complaint dismissed.

Dated: October 7, 1976

Respectfully submitted,

BOWER & GARDNER
Attorneys for Defendant-Appellant

STEVEN DIJOSEPH
BARBARA P. BILLAUER
Of Counsel

Service of three (3) copies of
the within Brief is
hereby admitted this 7th day
of October, 1976.

Attorney for Plaintiff